STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs. Case No. 1997-0531-FC

PAUL MICHAEL JOHNSON,

Defendant.
_____/

OPINION AND ORDER

Defendant has filed a "motion requesting the Court to rule on the legal argument presented in defendant's motion to strike."

Defendant pled guilty[1] to armed robbery, contrary to MCL 750.529, on June 12, 1997. Defendant was sentenced in this Court before the Hon. Michael D. Schwartz on August 18, 1997, to 144 to 600 months, with 24 days jail credit. Defendant subsequently moved to withdraw his plea, contending that he had given up his defense of diminished capacity because he had been promised to be sentenced to boot camp. The Court denied the motion, noting other felonies, for armed robbery and extortion, had been dismissed, and referring to the seriousness of the crime of armed robbery. The Court of Appeals denied a delayed application for leave to appeal on August 26, 1998. The Supreme Court denied the delayed application for leave to appeal from the Court of Appeals' order, on April 27, 1999. Defendant subsequently filed a motion for relief from judgment on January 22, 2004, represented by counsel, in which he argued that his sentence constituted cruel and unusual punishment. The Court denied the motion in an order dated March 15, 2004. Defendant filed a motion for reconsideration on March 22, 2004,

[1] The Judgment of Sentence reads defendant pled guilty; subsequent pleadings suggest defendant pled no contest.

which was denied in an *Opinion and Order* dated July 28, 2004. The Court noted at that point that the Court of Appeals had previously denied leave to appeal for lack of merit in the grounds presented, including the proportionality of sentence argument.

On October 19, 2005, defendant filed a second motion for relief from judgment. In this motion, defendant argued that his sentence was unconstitutional pursuant to recent Supreme Court cases, and, second, that his appellate counsel had been ineffective in failing to argue the ineffectiveness of trial counsel in falsely advising that if he pled no contest he would be sentenced to boot camp. Defendant then filed a motion on February 2, 2006, to strike the People's written response, giving a contradictory version of the alleged discussion, and to enforce an agreement reached with Macomb County Prosecutor's Office. Here, defendant contended that prosecutors agreed to stipulate to an evidentiary hearing so that additional testimony could be taken on the issue of promises made by trial counsel to persuade defendant to plead. On February 9, 2006, the Court, the Hon. Edward A. Servitto, issued an order denying the second motion for relief from judgment, finding that the arguments therein were, or could have been, made previously on appeal. Defendant moved to disqualify Judge Servitto, which was granted. Defendant then moved for reconsideration of the February 9, 2006, order. At the same time, defendant also filed a "Motion to Strike Written Response and to Enforce Agreement Reached with Macomb County Prosecutor's Office."

In a thorough *Opinion and Order* dated April 12, 2006, this Court denied the motion for reconsideration and denied the motion to strike the People's response and to enforce the agreement reached with the Macomb County Prosecutor's Office. In arriving at the latter decision, the Court noted that the "agreement reached" was to ask the Court for an evidentiary hearing to explore the issue of the ineffectiveness of appellate and trial counsel relating to the

voluntariness of defendant's plea. The Court at length explained that Judge Schwartz dutifully determined on the record that defendant's plea was voluntarily made. Defendant again requests a separate, specific ruling to the motion to strike the People's response and to enforce the oral agreement to ask the Court for an evidentiary hearing.

Defendant at this time argues that neither Judge Servitto, in denying the motion for relief from judgment, nor this Court, has ever ruled on the legal merits raised in defendant's motion to strike the prosecution's response. Defendant contends that there remains an issue which is yet to be determined by this Court, i.e., the motion, and defendant cannot pursue this issue in the Court of Appeals. Finally, defendant contends that if the Macomb County Prosecutor breached an agreement made which defendant relied upon to his detriment the denial of his second 6.500 motion was in error. Here, defendant contends that in exchange for the certainty that an evidentiary hearing would be held, defendant did not pursue and obtain evidence, in the form of affidavits or deposition testimony, of either of his trial attorneys. That is, defendant relied on the prosecution's agreement, which led him to abandon obtaining additional evidence to support his claim for ineffective assistance of counsel. Defense counsel analogizes the instant matter—a promise made post-conviction for 6.500 purposes—to promises made by the People during plea bargaining.

First, the Court remains persuaded that it did reach the substance of defendant's motion to strike and to enforce the agreement, by outlining the futility of same. Second, the Court remains persuaded that there is no authority for the Court to grant the requested relief.

Defendant brought a second motion for relief from judgment. MCR 6.500 *et seq.* "provides the exclusive means to challenge convictions in Michigan courts for a defendant who has had an appeal by right or by leave, who has unsuccessfully sought leave to appeal, or who is

unable to file an application for leave to appeal. . . ." 1989 Staff Comment to MCR 6.501. Pursuant to MCR 6.502(G):

> (1) Except as provided in subrule (G)(2), regardless of whether a defendant has previously filed a motion for relief from judgment, *after August 1, 1995, one and only one motion for relief from judgment may be filed with regard to a conviction. . .*
>
> (2) A defendant may file a second or subsequent motion based on a *retroactive change in law* that occurred after the first motion for relief from judgment or a claim of *new evidence* that was not discovered before the first such motion.

Further, pursuant to MCR 6.504(B)(2), "If it plainly appears from the face of the materials described in subrule (B)(1) that the defendant is not entitled to relief, the court shall deny the motion without directing further proceedings."

In the case at bar, defendant filed his first motion for relief from judgment in 2004 after unsuccessfully seeking leave to appeal. Defendant was not entitled, then, to file a second motion for relief from judgment unless it was based on a retroactive change in law and/or new evidence. This Court presumes the second motion for relief from judgment was accepted by Judge Servitto because defendant claimed a retroactive change in the law, i.e., that his sentence is now unconstitutional based on the United States Supreme Court decision of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 LEd2d 403 (2004). Once bringing the motion under the "retroactive change in the law" provision, then, defense counsel piggy-backed an additional argument pertaining to ineffective assistance of counsel. As stated in this Court's prior *Opinion and Order*, the first argument has no merit, as definitively ruled by Michigan courts, and Judge Servitto correctly ruled that the latter issue could have been raised previously. (Indeed, one of defendant's current counsel represented defendant in the first motion for relief from judgment.) Subsequent to the first motion for relief from judgment, defense counsel allegedly met with the prosecution, who agreed that an evidentiary hearing should be held on the matter of the

voluntariness of defendant's plea which defense counsel would request in a second motion for relief from judgment.

Even if the Court accepts defendant's argument that the People promised that it would agree to an evidentiary hearing on the ineffectiveness of counsel and the voluntariness of defendant's plea, and therefore defense counsel forewent obtaining affidavits from trial counsel in preparation for its second motion for relief from judgment, this Court still would not have authority for granting a second motion for relief from judgment. Nor does defense counsel provide such authority. While defense counsel argues that the People cannot renege on a promise in plea bargaining, the Court does not agree this means that the Court has authority to grant a successive motion for relief from judgment simply because the People would have agreed to support defendant's request for an evidentiary hearing. As set forth above, MCR 6.500 *et seq.*, is concerned with finality. If the Court were to accept defendant's position, an evidentiary hearing would have to be held any time post-conviction that defense counsel and the prosecution so agreed. There is no authority for this proposition, however.

Moreover, in its prior *Opinion and Order* the Court reviewed the record and noted that the sentencing judge dutifully asked defendant if he understood what he was doing, if he had been promised anything, and the judge assured the plea was voluntarily made. In other words, the Court found the record contradicted the argument that the plea was not voluntarily made, and, hence, there is no basis for an evidentiary hearing on this matter. Further still, as the Court noted previously, the law is clear that "[t]he court may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed except as provided by law." MCR 6.429(A). Again, both the Court of Appeals and the Supreme Court have ruled that the argument that defendant's sentence was disproportionate has no merit. What defendant ultimately hopes to

achieve with his motion to strike the People's response and to hold an evidentiary hearing is resentencing. The Court has not been presented with a basis for doing so.

In conclusion, the Court did in fact consider and rule upon defendant's "motion to strike written response and to enforce agreement reached with Macomb County Prosecutor's Office" in its April 12, 2006, *Opinion and Order*. The Court denied same for futility.

For the foregoing reasons, defendant's "motion requesting the Court to rule on the legal argument presented in defendant's motion to strike" is GRANTED, and the Court repeats that defendant's motion to strike written response and to enforce agreement reached with Macomb County Prosecutor's Office is DENIED. In compliance with MCR 2.602(A)(3), the Court states this case had been resolved previously and remains CLOSED.

IT IS SO ORDERED.

Diane M. Druzinski, Circuit Court Judge

Date:

DMD/ AUG 23 2006

cc: John Paul Hunt, Asst. Prosecuting Attorney
Patricia A. Maceroni, Attorney at Law

DIANE M. DRUZINSKI
CIRCUIT JUDGE

AUG 23 2006

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK
BY: Court Clerk